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Supreme Court of the United States

October Term, 1964

No. 537

REYNOLDS METALS COMPANY,
Appellant,
v.
THE STATE OF WASHINGTON, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF WASHINGTON

BRIEF OPPOSING MOTION TO DISMISS

DEWITT WILLIAMS
1440 Washington Building
Seattle, Washington 98101
Attorneys for Appellant

JOSEPH V. HEFFERNAN
REYNOLDS METALS COMPANY
Reynolds Metals Building
Richmond, Virginia 23218

WILLIAMS, LANZA, KASTNER & GIBBS
1440 Washington Building
Seattle, Washington 98101
Of Counsel

METROPOLITAN PRESS SEATTLE, WASH.

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IN THE

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REYNOLDS METALS COMPANY, *Appellant*, v. THE STATE OF WASHINGTON, et al., *Appellees.*	No. 537

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OPPOSING MOTION TO DISMISS

Appellant, pursuant to Rule 16(3) of the Rules of the Supreme Court of the United States, respectfully submits the following Brief Opposing Appellees' Motion to Dismiss.

Little need be said in opposition to the Appellees' Motion to Dismiss for the reason that their arguments were largely anticipated in the Jurisdictional Statement.

Questions Presented

Appellees' purported restatement of the "Questions Presented" is in total disregard of the fundamental and controlling facts in this case, and the resulting oversimplification is an incomplete, unrealistic and therefore unfair restatement of the questions. A simple test of the validity of this assertion is to note that in Appellees' statement of the "Questions" there is no indication whatsoever of the prime facts that (a) Appellant's processing of alumina in Washington is but a step in a total integrated

interstate manufacturing process in the course of which taxes are imposed at every stage (see Juris. St. pp. 4-7), and (b) the manufacturing here involved was subjected in Washington to a tax not imposed on competitors, and furthermore the product is shipped outside the state where its sale or further processing is again subjected to a tax (see Juris. St. pp. 27-32).

Counter-Statement of the Case

Appellees do not question the statement of the facts stated in the Jurisdictional Statement (Juris. St. pp. 4-7). However, seeking to avoid the real and substantial issues herein, Appellees have presented an oversimplified statement which, as above noted, wholly disregards, (a) the integrated interstate nature of Appellant's business, (b) the production activities occurring before and after the single stage performed in Washington, and (c) the various taxes imposed at these stages and their cumulative and multiple effect.

The references to the plant facilities and employment of men are also irrelevant as they are not the subject of this tax. As long as they have been mentioned, however, it should be noted that a large amount of taxes is paid in various forms to the State of Washington with respect to such ownership and employment, and Appellant should be deemed to have fully discharged its responsibility as to these items by the payment of such taxes.

Appellees' Argument

Appellees' Motion does not reach in any respect whatsoever issues raised by the FIRST, SECOND, THIRD

and FOURTH Questions because it totally disregards the impact of the integrated and successive manufacturing steps in several states here involved, and the successive taxes imposed by said states. These highly important facts and the impact of these taxes was not involved in any of the cases cited by Appellee. The first case cited, *J. D. Adams Mfg. Co. v. Storen,* 304 U.S. 307 (1938), struck down the tax there involved. In doing so it referred to the case of *American Mfg. Co. v. St. Louis,* 250 U.S. 459 (1919), which sustained a local license tax on manufacturing, but the issue there was quite different from that presented in the present case. The taxpayer there *conceded* that *the manufacturing activity* taxed was performed *wholly* within the taxing jurisdiction (St. Louis). In the cases in this Court which have cited *American Manufacturing* the Court has always considered the case to stand for the relatively simple proposition that *if* the manufacturing involved is purely 100 per cent a local activity, such totally local activity is taxable regardless of where, when or whether the goods are sold. Furthermore, the case must be viewed in its historical perspective in the evolution of the Commerce Clause, (described in the Juris. St. pp. 9-14). It was decided in 1919 during a period in the Court's history when an artificial and mechanical distinction between commerce and manufacturing was applied; and the 19th century view that all manufacturing was a purely local activity beyond the reach of the Commerce Clause still prevailed (*Kidd v. Pearson,* 128 U.S. 1 (1888); *U. S. v. E. C. Knight Co.,* 156 U.S. 1 (1895). As pointed out in Appellant's Jurisdictional Statement here-

in (pp. 11-12), eighteen years after *American Mfg.*, in *NLRB v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937), this Court categorically repudiated the outmoded doctrine that manufacturing was purely local and has consistently maintained its position since that date. However, we reiterate that regardless of this change *American Manufacturing* and the cases which cite it are not controlling because of the proven difference in the facts and the impact of successive taxes not involved in that case.

International Harvester Co. v. Evatt, 329 U.S. 416 (1947) is not controlling. If it has any relevance, it sustains Appellant's position because it approved a corporate franchise tax on the ground that the tax act had apportionment provisions calculated to impose the tax in relation to the value of the portion of the total business done in Ohio as related to the total business of the corporation. Previously such tax had been struck down by the Court, as noted by the following quotation:

> "In October, 1924, this Court struck down Ohio's then corporation franchise tax on the ground that it did not make an apportionment between local and interstate business so as to confine its tax to local business only." Pages 421, 422.

Likewise, in the instant case the tax has not been apportioned and, therefore, it unlawfully reaches, taxes and burdens that portion of the total production activity which was carried on outside of the state and previously subjected to taxation outside the state.

The general statement in the quoted footnote in *Federal Power Com. v. Union Electric Co.*, 14 L. ed. 2d 239 (1964),

is by no means controlling. The cases cited by Appellant demonstrate conclusively that manufacturing, such as Appellant's, is now held to be subject to the Commerce Clause, and therefore, to protection against burdens and duplicate taxes on such commerce where these are shown to exist, as they have been under the clear showing in this case.

General Motors Corp. v. Washington, 377 U.S. 436 (1964), was distinguished in the Jurisdictional Statement at pages 18-19.

The drastic change that has occurred in this Court's view since *Utah Power and Light Co. v. Pfost*, 286 U.S. 165 (1932), is dramatically demonstrated by the following quotation from that case:

> "• • • and hence the commerce clause of the Constitution does not prevent the state from exercising *exclusive* control over the manufacture." (Page 181) (Emphasis supplied)

As shown in the Jurisdictional Statement this view as to the "exclusive" power of the state which, as noted in the Jurisdictional Statement (pp. 8-14), is still being erroneously followed by the Supreme Court of Washington has long since been repudiated, and it is the application of the new view to the facts of this case which is sought in this appeal. No other case has called upon this Court to apply the modern view to integrated processing steps taking place in successive stages in various states.

The Discriminatory "Multiple Activities" Exemption (Fifth Question)

Appellees state that their so called "multiple activities" exemption provisions of the Washington tax statute has

"been before this Court on more than one occasion." It has not been before the Court in any case involving the tax on manufacturing; furthermore, it has not been "considered" by this Court in any true sense that a ruling has been made on it. In the per curiam ruling in *Field Enterprises, Inc. v. State,* 352 U.S. 806 (1956), the Washington decision was affirmed without opinion other than reference to *Norton Company v. Department of Revenue,* 340 U.S. 534 (1951), which related solely to a wholly separate point on that appeal. This sole reference in support of the per curiam opinion indicates that no consideration was given to the point here involved and in any event does not conclusively demonstrate that the issue was "considered."

The same may be said with respect to *General Motors v. Washington,* 377 U.S. 436 (1964). A searching examination of the majority opinion shows no discussion or even faint reference by the majority to this provision. The references by Appellees to Justice Goldberg's dissent, when properly considered in the context of the instant case, supports Appellant's position. There Justice Goldberg was dealing with a fact pattern involving a seller-manufacturer bringing its products within the state where they would compete with the products of local manufacturers *selling within the state.* In the instant case, the facts involve a manufacturer which does business under an act which forces it to pay a tax on manufacturing and again a tax on the selling of the product outside the state, whereas other manufacturers such as Appellant's competitors, selling their products within the state, do not pay the tax on

manufacturing, but only on the selling. It is impossible to imagine a clearer case of discrimination.

It is clear, therefore, that in neither of the cases referred to by the Appellees was this act "considered" and it is highly important that a ruling be obtained from this Court on this discriminatory provision.

This Court has often struck down local gross receipts taxes which impose upon interstate commerce multiple tax burdens not borne by local commerce (*Gwin, White & Prince, Inc. v. Heneford*, 305 U.S. 434 (1939); *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650 (1936); *Memphis Steam Laundry Cleaner, Inc., v. Stone*, 342 U.S. 389 (1952)).

CONCLUSION

The cornerstone of Appellees' position is the pervading generalization, reiterated on page 10 of the Motion to Dismiss, that manufacturing is always "purely a local activity" and can never be "a part of interstate commerce." For the reasons indicated on pages 8 through 14 of its Jurisdictional Statement, this generalization is erroneous as a matter of modern Constitutional law. But if indeed some doubts can be entertained, the issue is of such fundamental Constitutional importance that it should be fully briefed and argued before this Court and Appellees' motion denied.

Respectfully submitted,

DEWITT WILLIAMS
1440 Washington Building
Seattle, Washington 98101
Attorneys for Appellant

JOSEPH V. HEFFERNAN
REYNOLDS METALS COMPANY
Reynolds Metals Building
Richmond, Virginia 23218

WILLIAMS, LANZA, KASTNER & GIBBS
1440 Washington Building
Seattle, Washington 98101
Of Counsel